

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

325

BRIEF FOR APPELLANT

No. 21,855

DESI J. CHICQUELO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL IN FORMA PAUPERIS FROM THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF ISSUES PRESENTED

In Appellant's opinion, the following questions are presented:

1. Whether a person, who is addicted to narcotic drugs and merely has possession of narcotic drugs for his own use even though not in the original stamped package, can be guilty of purchasing, selling, dispensing, and distributing narcotic drugs in violation of 21 U.S.C. 4704(a).
2. Whether the narcotic drugs and narcotic paraphernalia introduced as evidence against Appellant should have been suppressed on the ground that such evidence was illegally seized during a time when he was under arrest without legal probable cause.
3. Whether a conviction for the purchase, sale, dispensation, and distribution of narcotic drugs is valid under the federal narcotics statutes, where the evidence lacks proof of quantitative sufficiency of the substance for use as a narcotic.

This case has not previously been before this Court.

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APPEAL IN FORMA PAUPERIS FROM THE UNITED
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Desi J. Chicuelo, was indicted on two counts of violations of the Federal narcotics laws. A trial by jury resulted in Chicuelo's conviction on the charge of purchasing, selling, dispensing, and distributing narcotic drugs not in or from the original stamped package, 26 U.S.C. 4704(a). Because this was Chicuelo's third or subsequent offense of the Federal narcotics laws, he received the mandatory minimum 10 year sentence at sentencing on March 29, 1968. The District Court granted Chicuelo's application to appeal

in forma pauperis on March 29, 1968. Jurisdiction of this Court is asserted under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Preliminary Statement The appeal relates to (a) the applicability of 26 U.S.C. 4704(a) to the mere possession by a narcotics addict of narcotic drugs in the absence of the appropriate tax stamps, (b) the question of whether the arresting police officer in this case had probable cause to make an arrest for a violation of the Federal narcotics laws, and (c) the sufficiency of heroin content required in order to convict under the Federal narcotics laws. What follows are the facts, as adduced at trial and at a pretrial motion to suppress evidence, necessary for review of this appeal.

The Arrest Chicuelo was arrested just before 12:00 midnight, July 26, 1967, at 14th and U Streets, N.W., Washington, D. C., by D. C. Metropolitan Police Officer Louis Hankins (TTr 59) who was in plain clothes (TTr 23,35). Officer Hankins and another officer were traveling south on 14th Street, N. W. between U and T Streets on routine cruise duty and were not on the scene because of an informer (MStr 14).

TTr = Trial Transcript
MStr = Pretrial Motion to Suppress Transcript

On the west side of 14th Street, cars were parked one behind the other (MStr 15) so that Officer Hankins' view of the sidewalk on the west side of 14th Street was limited to the gaps between the top structure of adjacent automobiles (MStr 16) and necessarily through the top structure of such automobiles.

Officer Hankins testified that he observed Chicuelo and another person - later identified as 'Elmer' - exchange something, that is, Elmer gave something to Chicuelo and Chicuelo gave something back to Elmer, (MStr 7,14, TTr 58) and that Chicuelo and Elmer were being followed by a group of 4 or 5 persons (MStr 7, 10, TTr 58), some of whom were known narcotics addicts (MStr 7). Chicuelo and Elmer were traveling north on 14th Street, (TTr 58) while Officer Hankins' car was traveling south on 14th Street. Officer Hankins testified he did not know what the 'something' was (MStr 14), and did not know or ever previously know Chicuelo or Elmer under any circumstances (MStr 8,13,14) and accordingly did not know whether Chicuelo and Elmer were narcotics addicts (MStr 14,17).

Based on the "exchange of something" he observed, the fact that the area is a narcotics traffic area, and the conclusion that Chicuelo and Elmer were being followed by a group of 4 or 5 persons (some of whom were narcotics addicts), Officer Hankins believed

there had been a violation of the Federal narcotics laws (MStr 32,33, TTr 68). After the scout car made a U-turn, Officer Hankins alighted from his car and started towards Chicuelo and the group which was behind Chicuelo. When Officer Hankins was within two feet (MStr 12) of Chicuelo, he observed Chicuelo put a small cream colored envelope in his shirt pocket leaving it partially exposed (MStr 11). Officer Hankins (who was in plain clothes) said he pulled his badge out of his pocket (TTr 59) and stated "Police" (MStr 12, TTr 59), and thereupon, Chicuelo ran. Officer Hankins apprehended Chicuelo, placed him under arrest for violation of the Harrison Narcotics Act (MStr 8), and then removed the envelope from Chicuelo's shirt pocket (MStr 8).

Officer Hankins testified that he approached the two groups (one group was Chicuelo and Elmer and the other group was the 4 or 5 people behind Chicuelo) because of the Uniform Narcotic Drug Act which permits inquiry of a known drug user in the company of other known drug users (MStr 17,18). As Officer Hankins approached the two groups, Elmer had already left and the group of 4 or 5 persons was moving south on 14th Street, leaving Chicuelo alone (MStr 18,59). Officer Hankins stated that he observed Chicuelo in the company of known narcotic drug users (TTr 18,19); and that based

on this observation plus the area and the time of night, he approached Chicuelo (TTr 19).

Testifying only for the purpose of the Motion to Suppress Evidence, which was renewed at trial, Chicuelo testified that Officer Hankins came up to him and immediately reached into Chicuelo's shirt pocket while demanding that some identification be produced (TTr 17). Chicuelo, not knowing Officer Hankins (who was in plain clothes) rebuffed this intrusion by an apparent stranger. There was a tussle, and Chicuelo was subdued by Officer Hankins as uniformed Officers arrived on the scene. Officer Hankins at this time removed two cream colored envelopes from Chicuelo's shirt (TTr 18).

Mr. Alvin Franklin also testified at the Motion to Suppress Evidence renewed at trial. While Franklin and Chicuelo were standing on the corner of 14th and U Streets, N. W., waiting for the traffic light to change, Officer Hankins stepped up on the curb with his hand held out, and immediately stated "you are under arrest" (TTr 27). Franklin stated that he did not see anything in Hankins' hand, and that he had never seen Hankins before. Franklin at first believed that Officer Hankins' remark was addressed to him, but Officer Hankins went right by him and pursued and then subdued Chicuelo (TTr 27, 28, 30, 31).

which weighed 284 milligrams before analysis and 244 milligrams after. The analysis showed that the material in the 7 capsules comprised (a) heroin hydrochloride, (b) quinine hydrochloride, and (c) mannitol. There was absolutely no evidence showing the percentage of heroin hydrochloride contained in the material in each individual capsule or in the total of 22 capsules.

STATUTES INVOLVED

The applicable statutes are set forth in Appendix A, page 1a, infra.

SUMMARY OF ARGUMENT

I. The Harrison Narcotic Act Does Not Apply to Purchaser-Addicts

While a specific finding was not made by the jury that Chicuelo was a narcotics addict, the evidence was overwhelming that he was. Since it is not a crime to be a narcotics addict, it cannot be a crime to merely possess narcotic drugs within the meaning of the Harrison Narcotic Act for that discrete period of time necessary to transport the drugs from the point of purchase to the point of use.

There is a paucity of House, Senate, and Conference Reports from which the intent of Congress can be ascertained as to the applicability of the Harrison Narcotic Act to purchaser-addicts. What little material

was found, indicates that Congress was concerned with raising revenue to finance World War I, when the Act was enacted. Congress did not intend to prosecute the ultimate consumer, the purchaser-addicts, rather it intended to prevent the avoidance of tax by purchaser-sellers and others who dealt in narcotic drugs.

II. The Narcotic Drugs Were Illegally Seized

The police did not know either Chicuelo or his companion and observed only an "exchange of something" between Chicuelo and his companion while they were in a narcotics traffic area. These facts were insufficient to constitute probable cause to arrest Chicuelo under the applicable cases in this jurisdiction. The contention that probable cause to arrest arose instantaneously when the police officer was within two feet of Chicuelo and saw a cream colored envelope in Chicuelo's shirt pocket is not consistent with human experience, and should be rejected.

III. Insufficiency of Heroin Content

The chemist's report showed only that heroin was present as one of the ingredients in the substances contained in the capsules seized. It did not reveal the percentage of heroin. There was no evidence showing that the heroin present in the capsules was useable as a narcotic. Offenses involving narcotics, necessarily

imply that, in order to convict, an accused must possess something of substance and that the substance must be in such quantity and quality so as to be usable as a narcotic. Absent each of these essentials, a conviction cannot stand. Since the total quantity of the substance received in evidence in relation to the alleged offense is relatively small, and there is an absence of evidence that the narcotic ingredient in the substance was of such a quantity so as to be capable of the use commonly made thereof, this conviction should be reversed.

ARGUMENT

- I. A PERSON, WHO IS ADDICTED TO NARCOTIC DRUGS, AND MERELY HAS POSSESSION OF NARCOTIC DRUGS FOR HIS OWN USE EVEN THOUGH SAID DRUGS ARE NOT IN THE ORIGINAL STAMPED PACKAGE, CANNOT BE GUILTY OF PURCHASING, SELLING, DISPENSING, AND DISTRIBUTING NARCOTIC DRUGS IN VIOLATION OF 26 U.S.C. 4704(a).

While the jury did not make a specific finding of fact that Chicuelo was a narcotics addict, there was abundant evidence that he was addicted to narcotic drugs and that the 22 capsules in his possession were for his own use. (For purposes of this argument, it will be assumed without conceding the point, that said capsules contained narcotics).

Officer Hankins testified that there were needle marks on Chicuelo's arms, that a narcotics kit

was taken from Chicuelo's person, and that it was likely that the kit had been recently used. Officer Hankins also testified that a 20 capsule per day habit would be normal (TTr 66). Chicuelo told the jury that he was a narcotics addict and had been addicted to heroin for the past twenty years. Franklin testified that he had known Chicuelo for at least the last 20 years and was of the opinion from personal association that Chicuelo was an addict.

None of the Government's evidence relating to Chicuelo's narcotics addiction was challenged by Chicuelo's trial counsel, and none of the evidence presented on Chicuelo's behalf concerning his addiction was challenged by the Government. Accordingly, it is reasonable to conclude that the jury would have specifically found, had they been instructed to make a specific finding, that Chicuelo was an addict and had possession of the 22 capsules for the purpose of using them to satisfy his own craving.

Status of Narcotics Addict is Not a Crime

It is not a crime to be a narcotics addict or to use narcotic drugs per se, Robinson v. California, U.S. Sp. Ct., 370 U.S. 660 (1962); just as it is not a crime to be mentally ill, or to be a leper, or to be afflicted with a venereal disease. Robinson, supra, at p. 666. The Court recognized that narcotic addiction is

a mental illness, and that persons addicted to narcotics are diseased and proper subjects for medical treatment, citing Linder v. United States, U.S. Sp. Ct. 268 U.S. 18 (1925), (Robinson, at p. 667, footnote 8).

It can be stated with reasonable certainty that the most likely way for an addict to obtain narcotic drugs is to purchase them. In order to use the drugs to satisfy his own craving, the addict must necessarily transport the drugs which he has obtained possession of to the place where he intends to use them, thereby necessarily having possession of such drugs for some discrete and measurable period of time. It follows then that if it is not a crime to be a narcotics addict, then it cannot be a crime to merely possess narcotic drugs for that necessary discrete period of time in which the addict transports the drugs from the point of purchase to the point of use. Otherwise, the holding of Robinson, supra, that the status of being a narcotics addict is not a crime, would be illusory unless an addict could instantaneously use the drugs upon obtaining possession thereof, which of course, would not be possible.

By Enacting the Harrison Narcotic Act,
Congress Did Not Intend to Punish Purchaser-
Addicts, But Intended to Impose a Tax
Upon Purchaser-Dealers and the Like

26 U.S.C. 4704(a), commonly called the Harrison Narcotic Act, was derived from Section 2553(a), Internal

Revenue Code 1939. The language of 26 U.S.C. 4704(a) is substantially identical to that of 2553(a), I.R.C. 1939, and first appeared in the Harrison Narcotic Act in 1919, 40 STAT, 1130, C.l, §1006, Act of Feb. 24, 1919, Revenue Bill of 1918. The relevant portions of these three statutes are reproduced in Appendix A to enable comparison.

Congress, when enacting 40 Stat. 1130 in 1919, was primarily concerned with financing World War I through taxation. In House of Representatives Report No. 767, 65th Congress, 2nd Session, dated September 3, 1918, Congressman Kitchen stated in the opening remarks of the Report:

..."In determining our fiscal policy for financing the war the first question that must be determined is, what percent of our total expenditures shall be financed by taxation..."

Beginning at page 35 of this Report, under the heading "Title X. SPECIAL TAXES", is a long list of items upon which special taxes would be levied to yield revenue. Following this list is less than one page of remarks by Congressman Kitchen concerning amendment of the original 1914 Harrison Narcotic Act, 38 STAT. 785 C.l, Act of Dec. 17, 1914. His remarks are directed primarily to the problem of raising tax money and not with the punishment of narcotics addicts. The above-referred to portions of House Report No. 767, 65th Congress, 2nd Session, are

reproduced as Appendix B to this brief. The Senate Report No. 617, 65th Congress, 2nd Session, Revenue Bill of 1918, dated December 6, 1918, concerning 40 Stat. 1130, adopted verbatim the above-cited House Report.

There appears to be no other House, Senate, or Conference Reports, from which can be gathered the intent of Congress concerning the applicability of the Harrison Narcotic Act to purchaser-addicts from 1918 to the present time. The paucity of such reports dealing with a statute which today is used to prosecute literally thousands of purchaser-addicts, should give one cause to question how the myth of the intent of Congress has manifested itself. Certainly House Report No. 767, supra, does not express an intent of Congress to prosecute purchaser-addicts. Rather, Congress intended to cut off loss of revenue by imposing taxes on purchaser-dealers, dispensers, and the like, who were avoiding the original Harrison Narcotic Act of 1914.

The first section of the original Harrison Narcotic Act, 38 STAT, 785. C.l, Act of Dec. 17, 1914, provided that

"...every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away [narcotic drugs] ... shall register with the collector of internal revenue... his name or style, place of business, and place or places where such business

is to be carried on ... [and] shall pay to the said collector a special tax at the rate of \$1.00 per annum...

The purpose clause of the 1914 Act states that the Act is to provide for the registration of persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away narcotic drugs, and to impose a special tax on these persons. The words "purchase or purchaser" were not in the 1914 Act. House of Representatives Report No. 23, 63rd Congress, 1st Session, dated June 24, 1913, Registration of Producers, and Importers of Opium, etc., accompanied the bill and was concerned with the importation of large quantities of narcotic drugs into the United States and the indiscriminate sale of narcotic drugs. It was the view of Congressman Harrison, author of said Report No. 23, supra, that such importation and interstate traffic of said drugs could be federally controlled by the use of the federal taxing power by requiring people who carry on the business of dealing in drugs to pay a yearly tax.

Said Report No. 23, supra, did not direct itself to the punishment of purchaser-addicts; but rather is clearly oriented to an attempt to control importation and interstate traffic in drugs by controlling sellers and other dealers in such drugs. House Report No. 23, supra, is reproduced in full as Appendix C to this brief.

Courts Have Construed the Harrison Narcotic
Act as Not Applying to Purchaser-Addicts,
But Rather to Purchaser-Sellers and Other
Dealers

In Nigro v. United States, U.S. Sp. Ct., 276 U.S. 332 (1928), the Court was factually concerned with an indictment charging a sale by Nigro to one Raithel not pursuant to the required IRS purchase order. The Court, in construing the Harrison Narcotic Act of December 17, 1914, 38 Stat. 785, as amended in the Revenue Act of 1918, February 24, 1919, §1006, 40 Stat. 1130, said that the Act was a genuine taxing statute providing for the raising of revenue, and that Congress inserted the taxing provisions in the Act because they tended to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law (at page 352), citing Doremus v. United States, U.S. Sp. Ct., 249 U.S. 86 (1919).

Congress did not intend that the Harrison Narcotic Act was to be used to prosecute a narcotics addict who merely had possession of narcotic drugs to satisfy his own cravings. Nigro v. United States, U.S. App. 8th Ckt., 117 F.2d 624 (1941). While the case factually related to an indictment for conspiracy to violate the Act by using fictitious prescriptions, the Court discussed at considerable length 26 U.S.C. 2553 from which 26 U.S.C. 4704(a) is derived. The Court gave a clear expression of its views of the Act as it applies to addicts, saying in part

...The Act is a revenue measure and the tax is imposed not upon a retail purchaser for his own use but upon importers, manufacturers, producers, dealers, and practitioners, persons who deal in and dispense the drugs. Its provisions are directed toward the collection of the taxes imposed, and the prevention of evasion by the persons subject to the tax.

Nigro v. United States, 276 U.S. 332...It is not unlawful to purchase the drugs unless the purchase is made in violation of Section 2553 or 2554(c), ... the proof does not indicate that he [the purchaser-addict] violated either of the provisions of the Act(at page 628) (emphasis added).

Elsewhere in the opinion, the Court stated

"...the omission of Congress to make the act of an addict in purchasing narcotics to satisfy his cravings an offense is evidence of an affirmative legislative policy to leave the purchaser [addict] unpunished..."
(at page 629)

The Court directed its remarks to substantially the same statute as the one under which Chicuelo was convicted. The Court clearly distinguished purchaser-addicts from purchasers-dealers and dispensers of narcotic drugs, in affirmatively stating that the Act did not apply to addicts.

When Congress said that "possession" of narcotic drugs in the absence of taxpaid stamps is *prima facie* evidence of a violation of the Act, it meant possession by one who sells or otherwise deals in such drugs. Congress did not intend that 26 U.S.C. 4704(a) was to be employed to prosecute narcotics addicts and subject them to severe penalties merely because they necessarily

Chicuelo, an Addict There was abundance of testimony, given by the Government, Chicuelo himself, and Franklin, that Chicuelo was addicted to narcotic drugs and in particular heroin. Officer Hankins, in addition to stating that Chicuelo was an addict (TTr 68), testified to the likely recent use of the "kit" taken from Chicuelo (TTr 67) and the needle marks on his arms (TTr 66). Chicuelo testified at length to the history of his life as an addict, and that when arrested he was on his way home to use some of the drugs (TTr 101). Franklin testified to his long association with Chicuelo and the fact that they both used drugs together in the past. Franklin testified that he believed Chicuelo was an addict (TTr 107), and that he was of the opinion Chicuelo did not sell narcotic drugs to other people (TTr 109).

Heroin Content Analysis Chicuelo's trial counsel stipulated to the chemist's report on the material taken from Chicuelo's person. The chemist did not testify. This evidence showed that one envelope taken from Chicuelo contained 15 capsules, weighing a total of 610 milligrams before and 570 milligrams after analysis. The analysis showed that the material comprised two ingredients, (a) heroin hydrochloride, and (b) mannitol. A second envelope taken from Chicuelo contained 7 capsules,

possess such drugs in the course of satisfying their own cravings. Both Nigro cases, supra, support this contention.

Because of the absence of evidence of the intent of Congress to prosecute narcotics addicts who necessarily possess drugs in the course of satisfying their own cravings, and the language found in the Nigro cases cited above, this Court is free to conclude and hold that 26 U.S.C. 4704(a), does not apply to a purchaser-addict who necessarily has possession of narcotic drugs for some discrete period of time in the course of satisfying his own cravings. This Court is urged to so hold, and reverse the conviction.

II. THE NARCOTIC DRUGS AND NARCOTIC PARAPHERNALIA, INTRODUCED AS EVIDENCE AGAINST APPELLANT, SHOULD HAVE BEEN SUPPRESSED ON THE GROUND THAT SUCH EVIDENCE WAS ILLEGALLY SEIZED DURING A TIME WHEN HE WAS UNDER ARREST WITHOUT LEGAL PROBABLE CAUSE

Prior to Officer Hankins' stepping up to Chicuelo at the corner of 14th and U Streets, N. W., the relative facts are that: (a) Officer Hankins was on the scene in plain clothes on routine cruiser car patrol and not because of an informer, (b) the area is a narcotics traffic area, (c) Officer Hankins observed between the gaps and the top structure of adjacent parked cars an "exchange of something" between Chicuelo

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which weighed 284 milligrams before analysis and 244 milligrams after. The analysis showed that the material in the 7 capsules comprised (a) heroin hydrochloride, (b) quinine hydrochloride, and (c) mannitol. There was absolutely no evidence showing the percentage of heroin hydrochloride contained in the material in each individual capsule or in the total of 22 capsules.

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The police did not know either Chicuelo or his companion and observed only an "exchange of something" between Chicuelo and his companion while they were in a narcotics traffic area. These facts were insufficient to constitute probable cause to arrest Chicuelo under the applicable cases in this jurisdiction. The contention that probable cause to arrest arose instantaneously when the police officer was within two feet of Chicuelo and saw a cream colored envelope in Chicuelo's shirt pocket is not consistent with human experience, and should be rejected.

III. Insufficiency of Heroin Content

The chemist's report showed only that heroin was present as one of the ingredients in the substances contained in the capsules seized. It did not reveal the percentage of heroin. There was no evidence showing that the heroin present in the capsules was useable as a narcotic. Offenses involving narcotics, necessarily

imply that, in order to convict, an accused must possess something of substance and that the substance must be in such quantity and quality so as to be usable as a narcotic. Absent each of these essentials, a conviction cannot stand. Since the total quantity of the substance received in evidence in relation to the alleged offense is relatively small, and there is an absence of evidence that the narcotic ingredient in the substance was of such a quantity so as to be capable of the use commonly made thereof, this conviction should be reversed.

ARGUMENT

- I. A PERSON, WHO IS ADDICTED TO NARCOTIC DRUGS, AND MERELY HAS POSSESSION OF NARCOTIC DRUGS FOR HIS OWN USE EVEN THOUGH SAID DRUGS ARE NOT IN THE ORIGINAL STAMPED PACKAGE, CANNOT BE GUILTY OF PURCHASING, SELLING, DISPENSING, AND DISTRIBUTING NARCOTIC DRUGS IN VIOLATION OF 26 U.S.C. 4704(a).

While the jury did not make a specific finding of fact that Chicuelo was a narcotics addict, there was abundant evidence that he was addicted to narcotic drugs and that the 22 capsules in his possession were for his own use. (For purposes of this argument, it will be assumed without conceding the point, that said capsules contained narcotics).

Officer Hankins testified that there were needle marks on Chicuelo's arms, that a narcotics kit

was taken from Chicuelo's person, and that it was likely that the kit had been recently used. Officer Hankins also testified that a 20 capsule per day habit would be normal (TTr 66). Chicuelo told the jury that he was a narcotics addict and had been addicted to heroin for the past twenty years. Franklin testified that he had known Chicuelo for at least the last 20 years and was of the opinion from personal association that Chicuelo was an addict.

None of the Government's evidence relating to Chicuelo's narcotics addiction was challenged by Chicuelo's trial counsel, and none of the evidence presented on Chicuelo's behalf concerning his addiction was challenged by the Government. Accordingly, it is reasonable to conclude that the jury would have specifically found, had they been instructed to make a specific finding, that Chicuelo was an addict and had possession of the 22 capsules for the purpose of using them to satisfy his own craving.

Status of Narcotics Addict is Not a Crime

It is not a crime to be a narcotics addict or to use narcotic drugs per se, Robinson v. California, U.S. Sp. Ct., 370 U.S. 660 (1962); just as it is not a crime to be mentally ill, or to be a leper, or to be afflicted with a venereal disease. Robinson, supra, at p. 666. The Court recognized that narcotic addiction is

a mental illness, and that persons addicted to narcotics are diseased and proper subjects for medical treatment, citing Linder v. United States, U.S. Sp. Ct. 268 U.S. 18 (1925), (Robinson, at p. 667, footnote 8).

It can be stated with reasonable certainty that the most likely way for an addict to obtain narcotic drugs is to purchase them. In order to use the drugs to satisfy his own craving, the addict must necessarily transport the drugs which he has obtained possession of to the place where he intends to use them, thereby necessarily having possession of such drugs for some discrete and measurable period of time. It follows then that if it is not a crime to be a narcotics addict, then it cannot be a crime to merely possess narcotic drugs for that necessary discrete period of time in which the addict transports the drugs from the point of purchase to the point of use. Otherwise, the holding of Robinson, supra, that the status of being a narcotics addict is not a crime, would be illusory unless an addict could instantaneously use the drugs upon obtaining possession thereof, which of course, would not be possible.

By Enacting the Harrison Narcotic Act,
Congress Did Not Intend to Punish Purchaser-
Addicts, But Intended to Impose a Tax
Upon Purchaser-Dealers and the Like

26 U.S.C. 4704(a), commonly called the Harrison Narcotic Act, was derived from Section 2553(a), Internal

Revenue Code 1939. The language of 26 U.S.C. 4704(a) is substantially identical to that of 2553(a), I.R.C. 1939, and first appeared in the Harrison Narcotic Act in 1919, 40 STAT, 1130, C.1, §1006, Act of Feb. 24, 1919, Revenue Bill of 1918. The relevant portions of these three statutes are reproduced in Appendix A to enable comparison.

Congress, when enacting 40 Stat. 1130 in 1919, was primarily concerned with financing World War I through taxation. In House of Representatives Report No. 767, 65th Congress, 2nd Session, dated September 3, 1918, Congressman Kitchen stated in the opening remarks of the Report:

..."In determining our fiscal policy for financing the war the first question that must be determined is, what percent of our total expenditures shall be financed by taxation..."

Beginning at page 35 of this Report, under the heading "Title X. SPECIAL TAXES", is a long list of items upon which special taxes would be levied to yield revenue. Following this list is less than one page of remarks by Congressman Kitchen concerning amendment of the original 1914 Harrison Narcotic Act, 38 STAT. 785 C.1, Act of Dec. 17, 1914. His remarks are directed primarily to the problem of raising tax money and not with the punishment of narcotics addicts. The above-referred to portions of House Report No. 767, 65th Congress, 2nd Session, are

reproduced as Appendix B to this brief. The Senate Report No. 617, 65th Congress, 2nd Session, Revenue Bill of 1918, dated December 6, 1918, concerning 40 Stat. 1130, adopted verbatim the above-cited House Report.

There appears to be no other House, Senate, or Conference Reports, from which can be gathered the intent of Congress concerning the applicability of the Harrison Narcotic Act to purchaser-addicts from 1918 to the present time. The paucity of such reports dealing with a statute which today is used to prosecute literally thousands of purchaser-addicts, should give one cause to question how the myth of the intent of Congress has manifested itself. Certainly House Report No. 767, supra, does not express an intent of Congress to prosecute purchaser-addicts. Rather, Congress intended to cut off loss of revenue by imposing taxes on purchaser-dealers, dispensers, and the like, who were avoiding the original Harrison Narcotic Act of 1914.

The first section of the original Harrison Narcotic Act, 38 STAT, 785. C.1, Act of Dec. 17, 1914, provided that

"...every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away [narcotic drugs] ... shall register with the collector of internal revenue... his name or style, place of business, and place or places where such business

is to be carried on ... [and] shall pay to the said collector a special tax at the rate of \$1.00 per annum...

The purpose clause of the 1914 Act states that the Act is to provide for the registration of persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away narcotic drugs, and to impose a special tax on these persons. The words "purchase or purchaser" were not in the 1914 Act. House of Representatives Report No. 23, 63rd Congress, 1st Session, dated June 24, 1913, Registration of Producers, and Importers of Opium, etc., accompanied the bill and was concerned with the importation of large quantities of narcotic drugs into the United States and the indiscriminate sale of narcotic drugs. It was the view of Congressman Harrison, author of said Report No. 23, supra, that such importation and interstate traffic of said drugs could be federally controlled by the use of the federal taxing power by requiring people who carry on the business of dealing in drugs to pay a yearly tax.

Said Report No. 23, supra, did not direct itself to the punishment of purchaser-addicts; but rather is clearly oriented to an attempt to control importation and interstate traffic in drugs by controlling sellers and other dealers in such drugs. House Report No. 23, supra, is reproduced in full as Appendix C to this brief.

Courts Have Construed the Harrison Narcotic
Act as Not Applying to Purchaser-Addicts,
But Rather to Purchaser-Sellers and Other
Dealers

In Nigro v. United States, U.S. Sp. Ct., 276 U.S. 332 (1928), the Court was factually concerned with an indictment charging a sale by Nigro to one Raithel not pursuant to the required IRS purchase order. The Court, in construing the Harrison Narcotic Act of December 17, 1914, 38 Stat. 785, as amended in the Revenue Act of 1918, February 24, 1919, §1006, 40 Stat. 1130, said that the Act was a genuine taxing statute providing for the raising of revenue, and that Congress inserted the taxing provisions in the Act because they tended to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law (at page 352), citing Doremus v. United States, U.S. Sp. Ct., 249 U.S. 86 (1919).

Congress did not intend that the Harrison Narcotic Act was to be used to prosecute a narcotics addict who merely had possession of narcotic drugs to satisfy his own cravings. Nigro v. United States, U.S. App. 8th Ckt., 117 F.2d 624 (1941). While the case factually related to an indictment for conspiracy to violate the Act by using fictitious prescriptions, the Court discussed at considerable length 26 U.S.C. 2553 from which 26 U.S.C. 4704(a) is derived. The Court gave a clear expression of its views of the Act as it applies to addicts, saying in part

...The Act is a revenue measure and the tax is imposed not upon a retail purchaser for his own use but upon importers, manufacturers, producers, dealers, and practitioners, persons who deal in and dispense the drugs. Its provisions are directed toward the collection of the taxes imposed, and the prevention of evasion by the persons subject to the tax.

Nigro v. United States, 276 U.S. 332...It is not unlawful to purchase the drugs unless the purchase is made in violation of Section 2553 or 2554(c), ... the proof does not indicate that he [the purchaser-addict] violated either of the provisions of the Act(at page 628) (emphasis added).

Elsewhere in the opinion, the Court stated

"...the omission of Congress to make the act of an addict in purchasing narcotics to satisfy his cravings an offense is evidence of an affirmative legislative policy to leave the purchaser [addict] unpunished..."
(at page 629)

The Court directed its remarks to substantially the same statute as the one under which Chicuelo was convicted. The Court clearly distinguished purchaser-addicts from purchasers-dealers and dispensers of narcotic drugs, in affirmatively stating that the Act did not apply to addicts.

When Congress said that "possession" of narcotic drugs in the absence of taxpaid stamps is *prima facie* evidence of a violation of the Act, it meant possession by one who sells or otherwise deals in such drugs. Congress did not intend that 26 U.S.C. 4704(a) was to be employed to prosecute narcotics addicts and subject them to severe penalties merely because they necessarily

possess such drugs in the course of satisfying their own cravings. Both Nigro cases, supra, support this contention.

Because of the absence of evidence of the intent of Congress to prosecute narcotics addicts who necessarily possess drugs in the course of satisfying their own cravings, and the language found in the Nigro cases cited above, this Court is free to conclude and hold that 26 U.S.C. 4704(a), does not apply to a purchaser-addict who necessarily has possession of narcotic drugs for some discrete period of time in the course of satisfying his own cravings. This Court is urged to so hold, and reverse the conviction.

II. THE NARCOTIC DRUGS AND NARCOTIC PARAPHERNALIA, INTRODUCED AS EVIDENCE AGAINST APPELLANT, SHOULD HAVE BEEN SUPPRESSED ON THE GROUND THAT SUCH EVIDENCE WAS ILLEGALLY SEIZED DURING A TIME WHEN HE WAS UNDER ARREST WITHOUT LEGAL PROBABLE CAUSE

Prior to Officer Hankins' stepping up to Chicuelo at the corner of 14th and U Streets, N. W., the relative facts are that: (a) Officer Hankins was on the scene in plain clothes on routine cruiser car patrol and not because of an informer, (b) the area is a narcotics traffic area, (c) Officer Hankins observed between the gaps and the top structure of adjacent parked cars an "exchange of something" between Chicuelo

and Elmer, (d) there was a group of four or five persons following closely behind Chicuelo and Elmer, some of whom were known narcotics addicts, (e) Officer Hankins did not know either Chicuelo or Elmer, and (f) Officer Hankins directly approached Chicuelo. Officer Hankins testified that there appeared to be some interplay between Elmer and the group (MStr 10). He did not testify that Chicuelo was involved with this group, however, he did in conclusionary terms state that Chicuelo was in the company of known narcotics addicts (MStr 19).

The facts of this case are controlled by Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964), and Washington v. United States, U.S. App., D.C. 397 F.2d 705, decided May 20, 1968.

In Perry, the police were at 14th and U Streets, N. W. via an informer. They observed Perry and his companions during a twelve block walk, stop and talk to several persons, some of whom were known narcotics addicts. The police on two occasions observed an "exchange of something" with a known addict. The police did not know Perry or his companions. Perry was arrested, capsules containing heroin were seized, and he was subsequently convicted of violating 26 U.S.C. 4704(a). The Court in reversing held there was no probable cause for Perry's arrest. Speaking through Judge Edgerton, the Court said:

...Seeing Perry 'exchange *** something' with a known addict, though not 'totally innocuous' was not probable cause for Perry's arrest.

The factual differences between Perry and this case make this a stronger one for reversal. In Perry, the police were on the scene by virtue of an informer, whereas, here they were on cruiser car patrol. Perry was twice observed to exchange something with known narcotics addicts, whereas neither Chicuelo nor Elmer were known to the police under any circumstances.

In Washington, supra, the police knew Washington as an addict and he was observed mingling with other known narcotics addicts. Additionally, the police actually saw Washington receive money when he passed 'something' to the group. In Chicuelo's case, these factors are missing; that is, the police did not know Chicuelo or Elmer, they did not observe Chicuelo mingle with known narcotic addicts, and they were unable to identify what the "something" which was exchanged was.

The Government can be expected to rely on Green v. United States, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958), a 2-1 decision, however, this case supports Chicuelo's contentions. In Green, the appellant was not known to be a narcotics addict, but he was definitely in the company of a known narcotics addict and the police made a direct approach to the known narcotics addict

rather than to Green. In this case, Chicuelo was not in the company of a known narcotics addict, and he, the unknown person, was the one who was directly approached by the police.

The evidence might support a finding that Elmer had contact with the group of addicts, but the evidence does not support a finding that Chicuelo was mingling with said group. The only possible link between Chicuelo and the group of addicts is Officer Hankins' testimony that Elmer seemed to have been with the part in the back as they [Chicuelo and Elmer] proceeded up the street (MSTR 10). It is submitted that to take this testimony as conclusive proof that Chicuelo was in the company of known narcotics addicts is to resort to clear speculation and conjecture.

It is apparent that Chicuelo's arrest was illegal under the above cited cases as being based on mere suspicion, and not as being based on probable cause which is the standard for arrest without a warrant.

The Government's position at the motion to suppress was that when Officer Hankins stepped up to Chicuelo and was only two feet away from him, he observed the top portion of a cream colored envelope sticking out of Chicuelo's shirt pocket, and that this instantaneously became the probable cause for the arrest because the officer in his experience as a narcotics

officer knew or had reason to believe that the envelope contained narcotics.

The arrest took place when Officer Hankins stepped up to Chicuelo while he and Franklin were waiting for the light to change at the corner of 14th and U Streets, N. W. The group of addicts was not present at this time. Based on the "exchange of something" which took place in a narcotics traffic area, and Officer Hankins' erroneous conclusion that Chicuelo was in the company of narcotics addicts, Officer Hankins believed that there had been a violation of the federal narcotics laws (MStr 32,33, TTr 68). It is submitted that Officer Hankins clearly intended to arrest Chicuelo and was in the process of doing so when he stepped up to Chicuelo, flashed his badge and stated "Police", Hicks v. United States, U.S. App. D.C. 382 F.2d 158 (1967). If Appellant ran (as Officer Hankins testified), this fact is not indicative of guilt and does not give rise to probable cause that a crime had been committed. Officer Hankins was in plain clothes, there were many people on the street, and he was within two feet of Chicuelo when he stated "Police", which statement was not heard by Chicuelo. Chicuelo and Franklin both testified that they believed Officer Hankins was a stranger trying to attack Chicuelo. When an officer insufficiently or unclearly identifies himself

or his mission, the flight by an accused must be regarded as ambiguous conduct. Wong Sun v. United States, U.S. Sp. Ct., 371 U.S. 471 (1963) at 482. Considering the time of night, the high density of pedestrian and vehicle traffic in the area, and that Officer Hankins was in plain clothes, the Officer was required to clearly identify himself. What Officer Hankins did in this case was clearly insufficient.

The Government's contention, that probable cause to arrest arose instantaneously when Officer Hankins saw the top of the envelope in Chicuelo's shirt pocket, located at the waistline, is contrary to ordinary human experience. The Government would have us believe that Officer Hankins, a capable experienced police officer in the process of making an arrest, had his attention focused on Chicuelo's pocket when he was only two feet from Chicuelo. For this to be, Officer Hankins would have had to completely ignore the rest of the person he was approaching. It is inherently incredible that an experience police officer approaching a suspect to make an arrest would take his eyes off of the suspect's face and hands. Jackson v. United States, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965).

Nothing resembling probable cause existed until after Officer Hankins' subdued Chicuelo, placed him under arrest for violating the Harrison Narcotic Act, and then withdrew the yellow envelopes from Chicuelo's shirt pocket.

Sibron v. New York, ____ U.S.____, 20 L.Ed 2d, 917, 36

LW 4589, June 10, 1968.

The facts of this case fall squarely within Perry and Washington, supra, since the arrest was in the process of being made when Officer Hankins stepped up to Chicuelo with his badge in his hand. The Government's contention that probable cause to arrest arose when Officer Hankins first observed a portion of an envelope projecting from Chicuelo's shirt pocket should be rejected as not consistent with ordinary human experience. Accordingly, the evidence seized from Chicuelo's person following such illegal arrest and subsequent illegal search, should have been suppressed.

III. A CONVICTION FOR THE PURCHASE, SALE, DISPENSATION, AND DISTRIBUTION OF NARCOTIC DRUGS IS INVALID UNDER THE FEDERAL NARCOTIC STATUTES, WHERE THE EVIDENCE LACKED ESSENTIAL PROOF OF QUANTITATIVE SUFFICIENCY OF THE SUBSTANCE FOR ITS USE AS A NARCOTIC AS REQUIRED BY SAID STATUTES

At trial, Chicuelo's trial counsel stipulated the report of the Government's chemist's analysis of the substance contained in a total of 22 capsules found on Chicuelo's person after the arrest. The report showed that the ingredients of the substance in the 15 capsules contained in the first envelope were (a) Heroin Hydrochloride, and (b) Mannitol, and that the ingredients of

the substance in the 7 capsules contained in the second envelope were (a) Heroin Hydrochloride, (b) Quinine Hydrochloride, and (c) Mannitol, Heroin Hydrochloride being a narcotic and the other ingredients being non-narcotics.

The Government's report revealed that only a qualitative narcotics test was performed on the contents of the capsules; that is, a test which shows only the presence or absence of narcotics. The report is absolutely silent on the question of whether a quantitative test was performed; that is, a test to determine the percentage of each of the ingredients in each of the capsules or in the total amount of substance. Therefore, it must be concluded that a quantitative test was not performed and that the Government had no evidence of the percentages of Heroin Hydrochloride in said capsules.

Because of the complete absence of evidence on the percentage of narcotics contained in each capsule or in the total amount of substance in the capsules, the conclusion is just as easily drawn that the percentage of narcotics was something more than zero percent and something less than 100 percent. Therefore, it cannot be concluded beyond a reasonable doubt that the amount of narcotics in each capsule, or for that matter in the total amount of substance contained in the capsules, was an amount which was useable as a narcotic so as to produce a medical physiological

reaction on someone using it, and more particularly on Chicuelo. Accordingly, the Government has not met its burden of proving beyond a reasonable doubt every element of a violation of 26 U.S.C. 4704(a).

Appellant's counsel is not aware of any adjudication, by the United States Supreme Court, the United States Court of Appeals for the District of Columbia, or the United States District Court for the District of Columbia, on the question of "mere traces or useability" of narcotic drugs.

Appellant's contention, however, has ample judicial support in this jurisdiction. Among the authorities are United States v. Glover, D.C. Gen. Sess. Nos. U.S. 9431-65, 9432-65, January 24, 1966; Edelin v. United States, D.C. App., 277 A.2d 395 (1967); Marshall v. United States, D.C. App., 229 A.2d 449 (1967); Johnson v. United States, D.C. App. No. 4166, unpublished, March 28, 1967.

In Edelin, supra, the appellant argued that the amount of heroin found in a narcotics paraphernalia kit was insufficient to show illegal possession of a narcotic drug in violation of 33 D.C. Code 402(a) (1951). He contended that the statute should be interpreted as requiring proof of possession of at least a usable quantity of narcotics, reasoning that (a) where the amount is microscopic or

infinitesimal and in fact unusable as a narcotic, the possibility of unlawful sale or use does not exist, and (b) that prescription of possession under these circumstances is inconsistent with the rationale of the statutory scheme of narcotics control. The District of Columbia Court of Appeals agreed with appellant and held that:

... where there is only a trace of a substance, a chemical constituent not quantitatively determined because of minuteness, and there is no additional proof of its usability as a narcotic, there can be no conviction under §33-402(a) (emphasis added)

The Court reversed the conviction with directions to enter an acquittal.

The same Court in Marshall, supra, approved the Edelin doctrine and placed the burden on the Government to prove that an accused possessed a usable amount of a narcotic, saying in part

... We do not remand for a new trial as there is no showing that the government has additional proof that the actual amounts involved were more than mere traces which were actually usable or salable as narcotics

The D. C. Court of Appeals, per curiam, also reversed a conviction for possession of narcotics in violation of 33 D. C. Code 402(a) in Johnson v. United States, supra, without an opinion on the authority of Edelin. While Edelin involved narcotics paraphernalia,

74 capsules were found in Johnson's apartment under a search warrant. However, the evidence was that the chemist did not try to make a quantitative test, and therefore he did not know whether the amount of heroin was sufficient to have a narcotic effect.

Judge Halleck, in United States v. Glover, supra in granting a judgment of acquittal in a narcotics possession case, stated

The crime of possession of an illicit narcotic drug carries with it the necessary implication that in order to be convicted the defendant must possess something of substance...In order that this defendant may be convicted of unlawful possession of a narcotic drug, to wit: heroin, the evidence must show: One, the person charged must have been in possession of a substance; Two, the substance must have been a narcotic drug; Three, the substance must have been in such quantity and quality to be susceptible of use as a narcotic; Four, the possessor must have knowledge of the possession of such substance, ... (emphasis added)

Cases in other jurisdictions supporting Chicuelo's contention are Greer v. State, 163 Tex. Crm. 377, 292 S.W. 2d 122 (1956), Pelham v. State, 164 Tex. Crm. 226, 298 S.W. 2d 171 (1957), State v. Moreno, 92 Ariz. 116, 374 P. 2d 872 (1962 en banc). Illustrative of the holdings in these cases is that of Pelham, supra, reversing a conviction for illegal possession of marijuana:

...the reasonable construction and interpretation to be applied here is that the legislature intended that to constitute the unlawful act of possessing marijuana

there must be possessed an amount sufficient to be applied to the use commonly made thereof. (298 S.W. 2d at 173)

Appellant submits that the usability test, as expounded and applied in the cases cited above, operates with like and equal force in the instant case. There was absolutely no evidence as to the amount of Heroin Hydrochloride present in the capsules, either individually or as a total, involved in this case. Surmise will not supply the answer. The burden was on the Government to prove that Chicuelo's possession involved a narcotic drug which could be administered for addiction purposes in the sense which Congress contemplated to be a danger to society. Because the Government failed to meet this burden of proof, this Court should reverse the conviction.

CONCLUSION

For the reasons stated, the judgment of conviction should be reversed. Depending upon the basis of reversal, the District Court should be instructed to enter a judgment of acquittal, or a new trial should be ordered in which the District Court would be ordered to suppress the evidence taken from Chicuelo's person and to instruct the jury to find specifically as to Chicuelo's status as an addict.

Respectfully submitted,


NICHOLAS A ADDAMS
Attorney for Appellant
Appointed by this Court

APPENDIX A

Statutory Provisions

1. Section 4704 (a) of the Internal Revenue Code of 1954, 26 U.S.C., reads as follows:

SEC. 4704. (a) General requirement. - It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

2. Section 2553 (a) of the Internal Revenue Code of 1939, reads as follows:

SEC. 2553. (a) General Requirement -

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package; and the absence of appropriate taxpaid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

3. 40 STAT. 1130, C.1, §106, Act. of Feb. 24, 1919,
reads in part as follows:

SEC. 1006. That section 1 of the Act of
Congress approved December 17, 1914, is
hereby amended to read as follows:

• • •

It shall be unlawful for any person to
purchase, sell, dispense, or distribute
any of the aforesaid drugs except in
the original stamped package or from the
original stamped package; and the absence
of appropriate tax-paid stamps from any
of the aforesaid drugs shall be prima facie
evidence of a violation of this section
by the person in whose possession same
may be found; and the possession of any
original stamped package containing any
of the aforesaid drugs by any person who
has not registered and paid special taxes
as required by this section shall be
prima facie evidence of liability to such
special tax

• • •

APPENDIX B

[1] REVENUE BILL OF 1918

House of Representatives Report No. 767, 65th Congress,
2nd Session, September 3, 1918 - Mr. Kitchen

The Committee on Ways and Means, to whom was referred the bill (H.R. 12863) to provide revenue, and for other purposes, having had the same under consideration, reports it back to the House without amendment and recommends that the bill do pass.

THE FIRST PROBLEM IN DETERMINING OUR FISCAL POLICY
TO FINANCE THIS WAR.

In determining our fiscal policy for financing the war the first question that must be determined is, what per cent of our total expenditures shall be financed by taxation and what per cent by bonds? Your committee has determined the proportion of the cost of the war that should be financed by taxation and by bonds not upon the basis of previous experience, for there is no analogy in history, but upon a careful consideration of the effect of the fiscal policy upon the morale of the people, upon the inflation of prices, upon production, and with reference to the relative ability of the people to pay taxes now and after the war.

On June 5 the Secretary of the Treasury advised your committee that the probable expenditures for the fiscal year ending June 30, 1919, would be about \$24,000,000,000 and recommended that one-third of this amount be raised in taxes, or \$8,000,000,000. On July 15 Mr. Sherley, Chairman of the Appropriations Committee of the House, confirmed the estimate of the Secretary of the Treasury and set out in detail the appropriations for this fiscal year, the total of which amounted to \$24,328,561,427.67, exclusive of contract authorizations.

[35] TITLE X. SPECIAL TAXES

After considering all the special tax sources suggested to your committee it has endeavored to select

such special taxes as would yield considerable revenue and at the same time well distribute the burden of taxation and be capable of satisfactory administration by the Treasury Department. It is believed that the special taxes recommended in the proposed bill will yield about \$165,000,000 annually.

The following table shows the special taxes levied under existing law and the proposed bill:

Table Omitted

[36] The decision of the Supreme Court in the Jim Fuey Moy case (June 5, 1916) has made it very difficult to enforce the act of December 17, 1914, known as the Harrison Narcotic Act. Under that decision it is impossible to hold criminally liable a person having in his possession any amount of the habit-forming drugs included within that act, unless such person is a dealer therein. The proposed bill in section 1008 amends that act so as to place an internal revenue tax, payable by stamp, upon such drugs, and provides that the possession of an unstamped package shall be *prima facie* evidence of a violation of the act.

Section 6 of the Harrison Narcotic Act exempts from the operation of the act preparations containing only a small proportion of narcotics. In the administration of the act, it has been found that the exemption has made the adequate enforcement of the act almost impossible, and that many preparations are marketed which contain a lawful amount of the drugs, but which are of great harm to the consumer. The bill therefore provides in section 1009 for the amendment of section 6 so as to make the Harrison Narcotic Act apply to all habit-forming drugs.

Under the present law only prepared smoking opium seized by the United States Government from any person violating the acts of October 1, 1890, as amended by the Acts of March 3, 1898, February 9, 1909, and January 7, 1914, may be sold to the highest bidder, pursuant to the provisions of section 3460 of the Revised Statutes of the United States. The Secretary of the Treasury does not have any authority to dispose of coca leaves, their salts, and derivatives, or compounds, or opium, except smoking opium, in any manner whatever, when seized for

violation of any of the above acts, or when seized under the act of December 17, 1914. Neither are the courts authorized by an statute to dispose of coca leaves, their salts and derivatives or compounds, or any opium, except smoking opium.

At the present time, the Federal Government has in its possession, at the present market value, about \$100,000 worth of opium salts and alkaloids, and salts and derivatives of coca leaves seized by it from persons violating the acts aforementioned.

[37] Section 1010 of the bill permits the Federal Government to deliver this amount of opium salts and alkaloids, and salts and derivatives of coca leaves, and any such salts and alkaloids, hereafter taken to any department, bureau, or agency of the United States Government for use for medicinal or scientific purposes.

TITLE XI. STAMP TAXES.

APPENDIX C

[1] REGISTRATION OF PRODUCERS and IMPORTERS OF OPIUM, etc.

House of Representatives Report 23, 63rd Congress, 1st
Session, June 24, 1913 - Mr. Harrison

The Committee on Ways and Means, to whom was referred the bill (H.R. 6282) to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

The part which the United States Government has played in the modern international movement for the control of the opium and allied traffics, the obligations by which it is bound by virtue of the international opium convention signed at The Hague January 23, 1912, should be sufficient evidence of the necessity for the passage of Federal legislation to control our foreign and interstate traffic in opium, coca leaves, their salts, derivatives and preparations. Even though there were no real domestic need for such legislation, it would seem, to be logical and to justify its intervention for the settlement of the far eastern opium traffic, that this Government is bound to enact legislation to carry out its humanitarian, moral, and international obligations.

But there is a real and, one might say, even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the States more effectually to enforce their police laws designed to restrict narcotics to legitimate medical channels.

There is probably no one who does not know that during the last 25 years opium, morphine, coca leaves, and cocaine have been rashly [2] imported, manufactured, and placed upon the general market in such forms as to be available to anyone who desires them or who desires

to trade on the addiction of his fellow creatures to them. Quite apart from the general evidence in this regard, there is abundant definite and particular evidence to the same effect now before the Congress. This may be seen by reference to the Report on the Opium Problem in the United States and on the International Opium Commission transmitted by the President to the Congress on February 21, 1910, and ordered to be printed (S. Doc. No. 377, 61st Cong., 2d sess.).

That report analyzes in a very particular manner the immense increase in the importation of opium and coca leaves during the last 25 years, their manufacture into morphine and cocaine, and the spread and consumption of these drugs amongst all classes of the community.

The gist of that report is that Italy, with a population of about 33,000,000, imports and consumes only six thousand and odd pounds of medicinal opium per annum; that Spain, with a population of 19,000,000 imports and uses so little that it is not separately entered in customs or other returns; that Austria-Hungary, with a population of 46,000,000, imports and consumes between three and four thousand pounds per annum; that Germany, with a population of about 60,000,000, imports about 17,000 pounds for home consumption; and that Holland, with a population of about 6,000,000, uses about 3,000 pounds per annum; that is, these five European countries, with a total population of 164,000,000, import and consume less than 50,000 pounds of opium annually; while the United States, with a population of 90,000,000, imports and consumes over 400,000 pounds of opium per annum.

In these European countries there is but a small importation of coca leaves and manufacture of cocaine for home consumption.

It has been claimed that the importation of opium and morphine into the United States during the last 50 years has not been excessive, but has simply grown pari passu with the increase in population. But this is not so. Our total population in 1870 was about 38,000,000, and 1909 about 90,000,000, showing an increase in population from 1870-1909 of 133 per cent. The importation of opium during the decade of 1860-1869 was 1,425,196 pounds, as against an importation of 6,435,623 pounds for the decade 1900-1909 -- an increase of 351 per cent. This has not taken into account opium smuggled during this period -- a so common practice at one time.

Thus, as against a 133 per cent increase in our total population in the five decades, there was an increase in the importation and consumption of opium of 351 per cent.

This enormous increase in the importation of and consumption of opium in the United States is startling, and is directly due to the facility with which opium may be imported, manufactured into its various derivatives and preparations, and placed within the reach of the individual. There has been in this country an almost shameless traffic in these drugs. Criminal classes have been created, and the use of the drugs with much accompanying moral and economic degradation is widespread among the upper classes of society. We are an opium-consuming nation to-day.

A wide canvass of the medical profession has determined that between fifty and seventy-five thousand pounds of opium are sufficient [3] to satisfy the medicinal needs of the American people, and that 15,000 ounces of cocaine only are necessary. We import, manufacture, and consume over 150,000 ounces of the latter.

The different States of the Union have, by pharmacy laws, made most strenuous efforts to prevent the indiscriminate sales of narcotics -- most of the States requiring that these drugs be sold only upon the prescription of physicians. But these laws have been ineffective because of the failure of the Federal Government to control the importation and interstate traffic in the drugs. It is the unanimous view of State, territorial, and municipal officials charged with police laws aimed at the traffic in narcotics that these laws will remain ineffective to a large extent until the Federal Government acts in support of them.

It may be said that no individual has ever represented to the Committee on Ways and Means that the present extensive traffic in narcotics should be allowed to continue. The opinion of in fact every one except illicit dealers is that the traffic ought to be greatly diminished, and that narcotics should be confined to legitimate medical channels. The only question at issue has been how best to do it. During the past few years the United States Opium Commission has made a thorough canvass of importers, manufacturers, physicians, and State officials, as well as of consumers, and as a result and in conjunction with a committee of

representatives of the Department of State, the Treasury Department, and the Department of Justice, it has been decided by them that only by customs laws and by the exertion of the Federal taxing power can the desired end be accomplished. In that opinion your committee concur.

Approaching the question from this point of view, a series of bills has been designed. One of these is already on the statute books -- the opium-exclusion act, approved February 9, 1909 -- and it would now seem to need amendment, in order to secure more certain Federal control of the importation and interstate traffic in narcotics.

The bill H.R. 6282 provides for that situation.

The first section of the bill requires every person who produces, imports, manufacturers, compounds, deals in, dispenses, sells, distributes, or gives away any opium or coca leaves or any of their derivatives, to register their name, etc., with the collector of internal revenue of the district where they carry on their business; and also to pay a tax of \$1 per annum. It further provides that it shall be unlawful for any person to do business of this nature without having registered and paid the special tax.

Section 2 provides that it shall be unlawful for any person to sell, barter, exchange, or give away any of these drugs, except in pursuance of a written order of the purchaser or person to whom such article is given on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue; and requires them to keep such order for a period of two years so that it may be accessible for inspection by Federal and State officials. The purchaser who makes out this order blank must keep a duplicate. This method of duplicate order blanks, however, is expressly made not to apply to the dispensing of the drugs by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice, provided they shall be in personal attendance upon their patient; nor to the dispensing of the drugs by a pharmacist to a consumer [4] upon a written prescription of a physician; nor to the exportation of drugs. The duplicate order blanks are to be prepared and sold by the Internal Revenue Department for a nominal sum, and explicit provisions made as to how the blanks shall be filled out, etc.

Section 3 provides that any person registered under this act may be required by the collector of internal revenue for his district to disclose to him his records.

Section 4 makes it unlawful for any person who shall not have registered and paid the special tax to transport any of these drugs from State to State, and in this section common carriers are excepted, as well as the written prescriptions of physicians, etc.

Section 5 makes accessible to the Federal and State officials the duplicate order forms in the files of individuals; also permits the collector of internal revenue to furnish certified copies of these returns to any State officials. It further provides that the collectors of internal revenue shall furnish upon written request to any person a certified copy of the names of any or all persons who may be listed in their respective collection districts as special taxpayers under the provisions of this act upon payment of a fee of \$1 for each 100 names or fraction thereof in the copy so requested.

Section 6 exempts from the provisions of this act preparations and remedies which contain so small a proportion of narcotics as to render it impossible that they should become habit-forming drugs.

Section 7 makes applicable laws relating to the collection of internal-revenue taxes, and especially section 3229 of the Revised Statutes, permitting compromises and remission of fines by the Commissioner of Internal Revenue, upon the advice of the Secretary of the Treasury and the Attorney General.

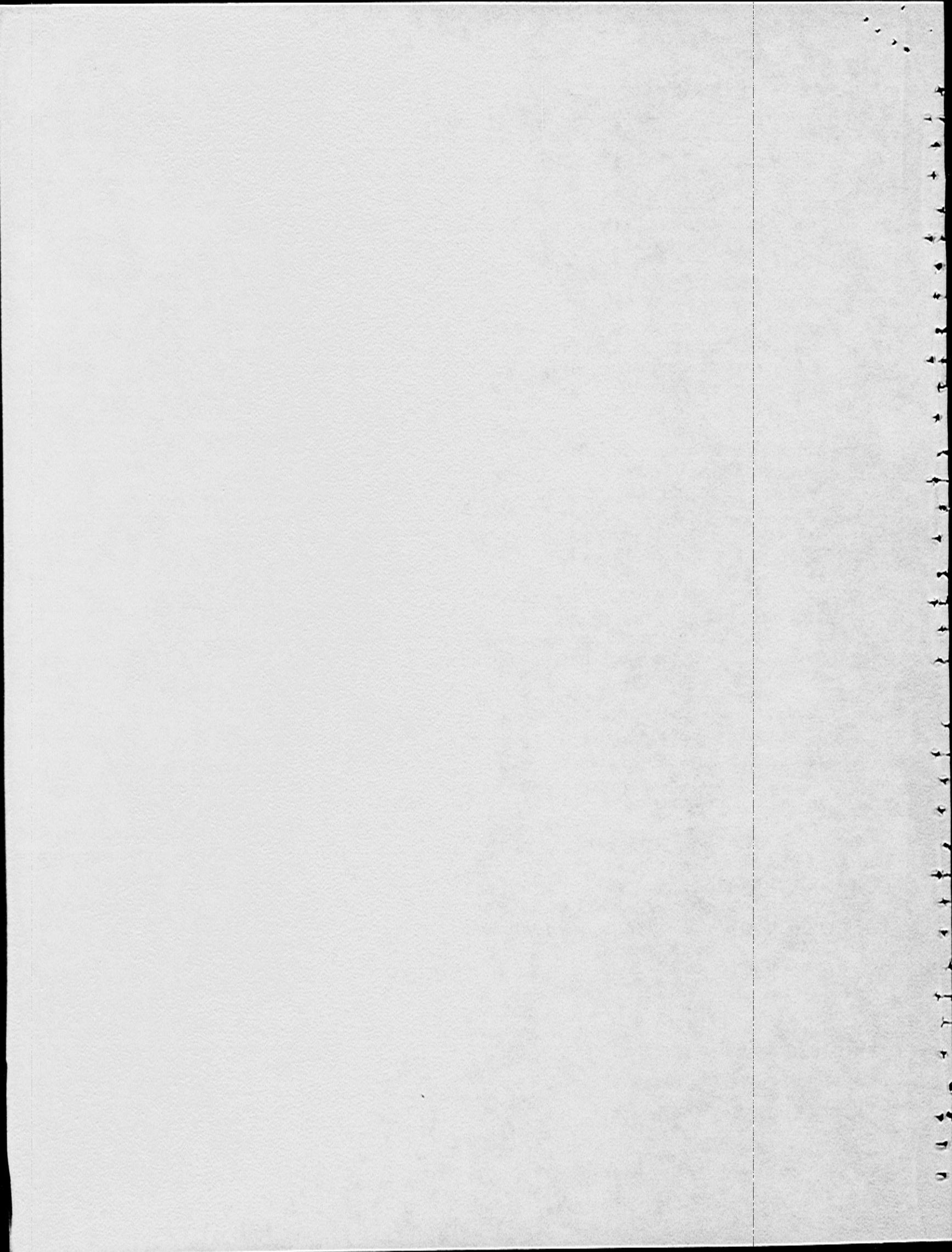
Section 8 makes it unlawful for any person not registered and who has not paid the tax to have any of these drugs in his possession and such possession the presumptive violation of the act. Exceptions are again made for drugs which have been prescribed by physicians, etc., or which are held by warehousemen or public officials or common carriers.

Section 9 is the penal section, the penalties being a \$2,000 fine or imprisonment for not more than 5 years, or both.

Section 10 authorizes the employment of the officials to put the act into effect.

Section 11 appropriates the sum of \$150,000 to carry the act into effect.

Section 12 makes clear that nothing in this act is to interfere with the pure-food law and with the opium-exclusion act.



4-12-72
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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,855

DESI J. CHICQUELO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEREKER,
JAMES A. TREANOR, III,
Assistant United States Attorneys.

Cr. 1241-67

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 4 1968

Nathan J. Paulson

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OTHER REFERENCES

21 U.S.C. § 174	1, 2
22 U.S.C. § 2553	7
26 U.S.C. § 4704(a)	1, 2, 7

ISSUES PRESENTED *

In the opinion of appellee, the following issues were presented:

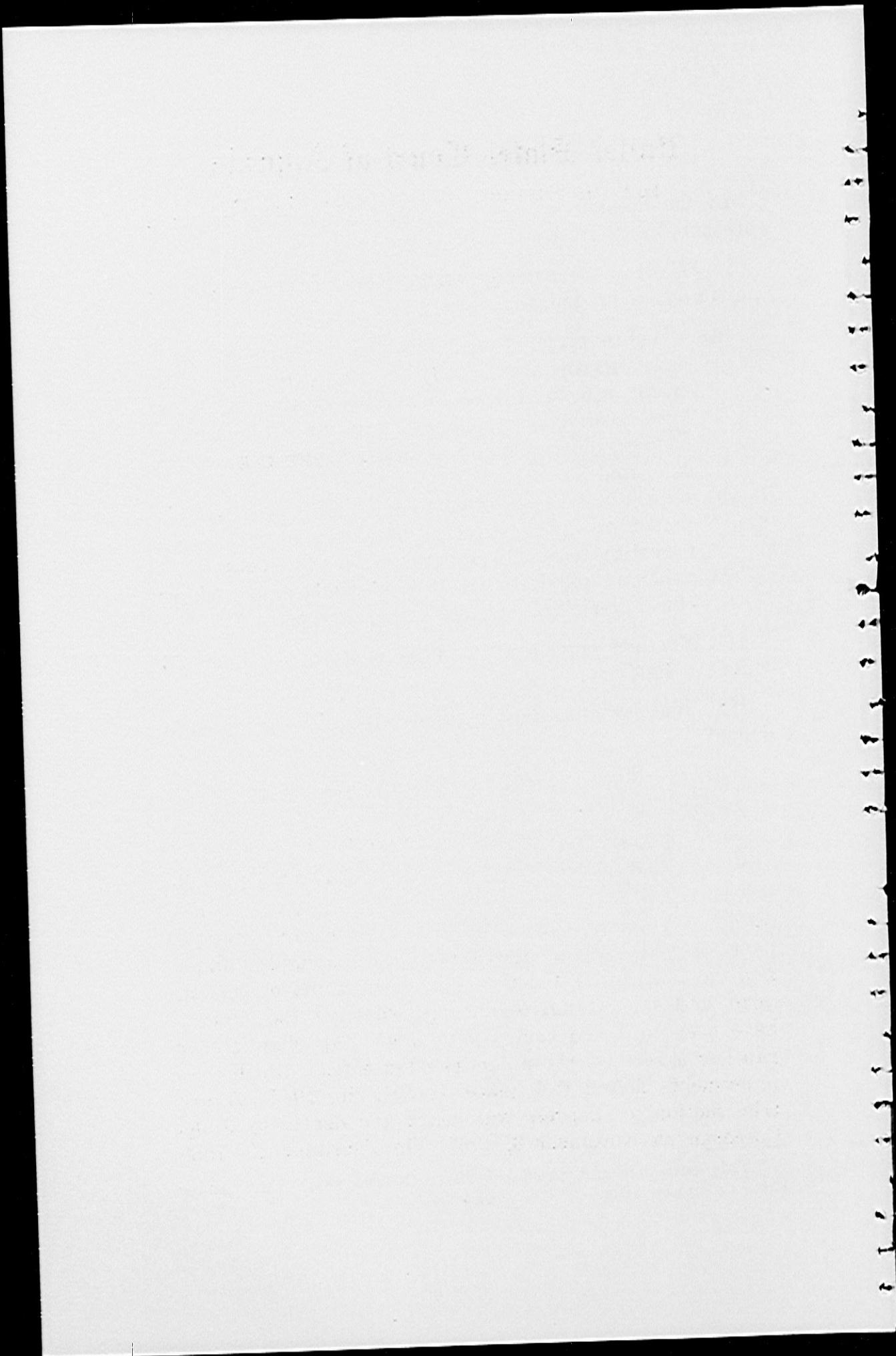
I. Whether the narcotic drugs seized from appellant's person were inadmissible where

- (a) a police officer familiar with the narcotics field saw, in an area commonly used for narcotics traffic and within the ambit of a group containing known addicts, appellant engage in a transaction of the kind commonly associated with a narcotics sale, and
- (b) appellant was observed to try and conceal on his person an envelope of the type frequently used in narcotics transactions, and
- (c) appellant percipitously fled when the approaching officer identified himself as a police officer?

II. Whether appellant could be prosecuted under 26 U.S.C. § 4704(a)?

III. Whether appellant was in possession of narcotic drugs?

* This case has not previously been before this Court under same or similar title.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,855

DESI J. CHICQUELO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Summary of Proceedings

By indictment filed October 2, 1967, Desi J. Chicuelo was charged with violation of 26 U.S.C. § 4704(a) (possession of narcotic drugs not in the original stamped package and without the appropriate taxpaid stamps) and violation of 21 U.S.C. § 174 (facilitation of concealment and sale of narcotic drugs, knowing the same to have been imported contrary to law). Appellant's warrantless arrest for the narcotics offense from which these indictments flowed took place on July 26, 1967. A pre-trial motion to suppress was heard and denied by Judge Corcoran on November 3, 1967. On February 20, 1968,

the day appellant's trial began, a renewed motion to suppress was heard and denied by Judge Smith. On February 21, 1968 the jury returned a verdict of guilty on count one, the Harrison Act Violation (26 U.S.C. § 4704 (a)) and not guilty on the count two offense relating to a violation of 12 U.S.C. § 174.

B. The Trial

The prosecution called only one witness to testify in its case, Detective Louis T. Hankins who, on July 26, 1967, was as he was on the date of trial, a member of the Narcotics Squad of the Metropolitan Police Department. He had been assigned to that squad since 1964 (Tr. 56), and during that period he had participated in more than one hundred investigations involving narcotic offenses (Tr. 57).¹ On the evening of Chicuelo's arrest, at about 11:50 p.m., Hankins and his partner were patrolling south, in an unmarked car, in the 1900 block of 14th Street, Northwest (Tr. 57-58).² While in that block Hankins observed appellant and a companion walking north on 14th Street; they were in the process of making an exchange when he first noticed them. He saw Chicuelo give the man something and get something back. (Tr. 58).³ The police car then made a U turn at the intersection of U Street, and returnd to the scene of the apparent transaction (Tr. 58). He had never seen the two men before (Tr. 58).

Hankins got out of his cruiser and walked towards Chicuelo.⁴ As he approached he took out his badge and

¹ He also served as an undercover agent during parts of 1952 and 1953 (Tr. 5-6, November 3, 1967 motion to suppress hearing).

² Hankins stated that 14th & U Streets, Northwest is an area of heavy traffic in narcotic drugs (Tr. 6, November 3, 1967 motion to suppress hearing).

³ Walking behind these two was an accompanying group of men, some of whom were known addicts (Tr. 9, November 3, 1967 motion to suppress hearing).

⁴ Hankins approached the appellant with a narcotic vagrancy observation in mind (Tr. 12, 17-19, November 3, 1967 motion to

identified himself as the police. Just before he identified himself he noticed that Chicuelo was hurriedly stuffing a small cream colored envelope into a lower right hand pocket of the shirt-jacket he was wearing.⁵ This attempt at concealment was unsuccessful as half of the envelope remained visible. When Hankins said that he was the police, appellant ran. Hankins apprehended him in the 1400 block of 14th Street (Tr. 59). A search revealed that the envelope previously observed held seven gelatin capsules containing a white powder. Another cream colored envelope containing fifteen like capsules was also uncovered (Tr. 59-60). They lacked taxpaid stamps (Tr. 64). Narcotics paraphernalia were also discovered on appellant's person (Tr. 60).

Following a brief explanation by Detective Hankins on the manner in which the materials taken from appellant could be used to administer a narcotic dose (Tr. 62-64) and cross examination relating to Hankins' opinion as to Chicuelo's habit (Tr. 65-68), a chemical analysis of the articles seized from appellant was, by stipulation, read to the jury (Tr. 69). It disclosed that after analysis the batch of fifteen capsules contained 570 milligrams of the ingredients heroin hydrochloride and mannitol, and the batch of seven capsules contained 244 milligrams of the ingredients heroin hydrochloride, quinine hydrochloride and mannitol (Tr. 71). The bottle top cooker contained traces of Heroin hydrochloride and quinine hydrochloride (Tr. 71).

After a recital of the grim history of his addiction, which revealed that on the day of his arrest he had an eighteen or nineteen capsules a day habit (Tr. 96), Chicuelo described the events of the 26th. His first encounter with narcotics took place when he awoke; he used

suppress hearing). As he walked up the others all left, leaving appellant standing by himself (Tr. 18, 32, November 3, 1967, motion to suppress hearing).

⁵ In his experiences as a narcotics officer Hankins had seen other cream colored envelopes similar to the one Chicuelo sought to secrete (Tr. 12, November 3, 1967 motion to suppress hearing).

two capsules (Tr. 98). At noon he purchased twenty capsules and used six of them (Tr. 97). Although he found them to be "no good", they did keep him from getting real sick (Tr. 97). Sometime later he went to 14th and U Streets, Northwest, with the remaining capsules looking for their seller so that he could get his money back (Tr. 99). While there he purchased seven capsules from another peddler known as Elmer (Tr. 99). These capsules came in a small envelope which he put in his shirt pocket (Tr. 100). After the transaction he walked up 14th Street where he met Al Franklin (Tr. 100).

Franklin testified for appellant. The sum of his testimony before the jury was that he knew Chicuelo to be an addict (Tr. 103-111). At the earlier motion to suppress Franklin testified that he was walking with Chicuelo on 14th Street when Detective Hankins walked up and said that "You are under arrest." (Tr. 27) and swung at appellant with his fists (Tr. 26-27). At the same hearing Chicuelo stated that Hankins had walked up to him and reached into his pocket, while simultaneously showing him a badge (Tr. 17). He grabbed at Hankins hand and tussled with him; the two men were in the middle of 14th Street when appellant was finally subdued (Tr. 18). Franklin said that he never saw the officer go into Chicuelo's pocket (Tr. 31). Neither appellant nor Franklin related the circumstances of the arrest for the jury. After their testimony the defense rested (Tr. 111).

ARGUMENT

I. Probable cause existed for appellant's arrest.

(Tr. 8-10, 32, 58-59)

"The sum total of the reams that has been written on the subject is that a peace officer may arrest without a warrant when he has reasonable grounds, in the light of the circumstances of the moment as viewed through his eyes, for the belief that a felony has been committed and

that the person before him committed it."⁶ It is appellee's position that the particular circumstances of the late evening of July 26, 1967 as viewed through the eyes of a cautious and prudent police officer, conditioned by his own observations and guided by his long experience in the narcotics field, could reasonably have led that officer to believe that the crime of unlawful possession of narcotic drugs was being committed in his presence by appellant. *Jackson v. United States*, 112 U.S. App. D.C. 260, 302 F.2d 194 (1962) and *Bailey v. United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

Detective Hankins, an experienced member of the narcotics squad, was patrolling in the 1900 block of 14th Street, Northwest, a block notorious for its connection with the illicit narcotics trade,⁷ when he noticed a group containing known addicts (Tr. 58, Tr. 8-10, Nov. 3, 1967 motion to suppress hearing). Walking about two feet ahead of this group were two men, one of whom appeared to Hankins to be part of the following group (Tr. 58, Tr. 9, Nov. 3, 1967 motion to suppress hearing). The second man was appellant (Tr. 58). Neither of the two was known to Hankins (Tr. 58). He saw the two make the type of exchange characteristic of a narcotics transaction (Tr. 58, Tr. 10-11, Nov. 3, 1967 motion to suppress hearing). When Hankins approached, Chicuelo's companion and the other members of the group left, leaving Chicuelo alone on the sidewalk (Tr. 18, 32, Nov. 3, 1967 motion to suppress hearing). As he walked up the Detective saw Chicuelo putting away an envelope (Tr. 59) of the kind frequently used in narcotics transactions (Tr. 12, Nov. 3, 1967 motion to suppress hearing). When Hankins identified himself to appellant as a police officer, Chicuelo bolted and ran; Hankins pursued and apprehended him (Tr. 59).

⁶ *Bell v. United States*, 102 U.S. App. D.C. 383, 388, 254 F.2d 82, 87 (1958), cert. denied, 358 U.S. 885.

⁷ See *Freeman v. United States*, 116 U.S. App. D.C. 213, 322 F.2d 426 (1963) and *Dorsey v. United States*, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967).

There can be no doubt that when a police officer familiar with the narcotics field sees, in an area commonly used as a situs of narcotics traffic, a transaction of the kind commonly associated with a narcotics sale, taking place within the ambit of a group containing known addicts, he may investigate what he has seen and ask questions of the participants. *Green v. United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958), cert. denied, 359 U.S. 917 (1959).⁸

This is not to say, of course, that such circumstances would always, without more, provide probable cause to arrest either one of the participants in the putative sale. However, when there is cast on that background the prominent factors that the person ultimately arrested was seen putting away an envelope of the type associated with narcotic sales and run when approached by a police officer, a case for probable cause is clearly made out.

Percipitous flight, even against the background of an apparent narcotics deal, has usually been held to tip the balance towards probable cause only when a further conjunctive element, indicative of the illegal nature of the accused's conduct, is present. This element has commonly been police knowledge of the reputation either of the accused or his immediate companion as addicts,⁹ but not always.¹⁰ Here, while there was peripheral association with known addicts, appellant's possession of the familiar envelope filled in the picture for the witnessing police officer. Flight, after that awareness, surely gave Detective Hankins probable cause to believe that Chicuelo was unlawfully in possession of narcotics.

⁸ See also *Freeman v. United States*, *supra* note 7; *Washington v. United States*, — U.S. App. D.C. —, 397 F.2d 705 (1968); and *Worthy v. United States*, — U.S. App. D.C. — (No. 20,888, decided August 6, 1968).

⁹ See *Green v. United States*, *supra*; *Freeman v. United States* and *Dorsey v. United States*, *supra* note 7, and *Washington v. United States*, *supra* note 8.

¹⁰ *Jackson v. United States*, 112 U.S. App. D.C. 191, 301 F.2d 515, cert. denied, 369 U.S. 859 (1962).

II. An addict's possession of narcotic drugs is a violation of 26 U.S.C. § 4704(a), relating to the purchase, sale, distribution or dispensation of narcotic drugs except in or from the original stamped package.

Appellant suggests that mere possession of narcotic drugs by an addict for the necessary period it takes him to transport them from place of purchase to place of use may not be and has not been made unlawful. For the former proposition he points to *Robinson v. California*,¹¹ where the Supreme Court ruled that imprisonment of an addict as a criminal solely because of his addiction is repugnant to the Constitution. However, nowhere in that case is there a suggestion of a similar prohibition against imposing criminal sanctions on an addict's possession for personal use. Rather, the Court expressly recognized that criminal sanction could be imposed on possession.¹² For the latter proposition appellant asserts that Congress never intended the statute here involved to be so applied. Not only is this assertion belied by appellant's own cited authority,¹³ but the statute itself speaks of "any person"¹⁴ and makes possession by any person of unstamped drugs *prima facie* evidence of a violation of the statute.¹⁵

¹¹ 370 U.S. 660 (1962).

¹² 370 U.S. at 664.

¹³ *Nigro v. United States*, 117 F.2d 624 (8th Cir. 1941) recognizes that an addict who purchases drugs to feed his own habit may be prosecuted under 26 U.S.C. § 2553 (Int. Rev. Code, 1939). This is the predecessor of 26 U.S.C. § 4704(a) (Int. Rev. Code, 1954).

¹⁴ "Any person" means just that. See *Nigro v. United States*, 276 U.S. 332 (1928) at page 344.

¹⁵ See *United States v. Wong Sing*, 260 U.S. 18 (1922) and *Frazier v. United States*, 82 U.S. App. D.C. 332, 163 F.2d 817, affirmed 335 U.S. 497 (1948).

III. The substance recovered from appellant was useable as a narcotic drug.

(Tr. 63-64, 67, 71, 97)

Appellant argues that a necessary element of the offense was proof of the sufficiency of the substance recovered from Chicuelo as a narcotic drug.¹⁶ Assuming¹⁷ this is an element of the offense charged, the evidence introduced at trial obviously established it. The testimony of the detective from the narcotics squad (Tr. 63-64, 67) revealed that what was recovered from Chicuelo could have been ingested by him in the manner customarily used by addicts; and chemical analysis revealed that the substance contained the ingredient heroin hydrochloride (Tr. 71). Demonstrably then, whatever heroin present was in a form capable of being self administered¹⁸ and hence, irrespective of the potency of a possible dose relative to Chicuelo's needs, would have contributed something towards satisfying his habitual demand. Patently, without regard to what percentage of the substance recovered was heroin, the substance was useable as a narcotic drug.¹⁹

¹⁶ By this appellee does not understand that it is claimed that the quantity of heroin recovered must be sufficient to satisfy the habitual demand of the unique addict involved or to create a euphoric state for him. A necessary corollary to that proposition would be proof of either the size of the habit or the tolerance of the person in whose possession heroin is found; a burden which the prosecution, without the accused's co-operation, could never meet.

¹⁷ See *State v. Dodd*, 28 Wis.2d 643, 137 N.W.2d 465 (1965).

¹⁸ The pivotal issue in the "mere traces" cases seems to be absence or presence of the narcotic involved in a form susceptible of consumption. See *Edelin v. United States*, 227 A.2d 395 (D.C. App. 1967) and cases cited therein, particularly *People v. Leal*, 50 Cal. Rptr. 777, 413 P.2d 665 (1966).

¹⁹ Six capsules from the larger batch were actually used by appellant. While he said they were "no good", he also said that they at least kept him from getting sick (Tr. 97).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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Assistant United States Attorneys.

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F. WEB-T
United States Court of Appeals 93rd Cir.
for the District of Columbia Circuit
(1)

REPLY BRIEF FOR APPELLANT

FILED DEC 16 1968

Nathan J. Paulson
CLERK

*Watson vs
No 21186
reversed*

NO. 21,855

DESI J. CHICQUELO,

Appellant.

APPEAL IN FORMA PAUPERIS FROM THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Crm. No. 1241-67

NICHOLAS A ADDAMS
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,855

DESI J. CHICQUELO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL IN FORMA PAUPERIS FROM THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Counsel for Appellant (hereinafter referred to as Chicuelo) considers Appellee's brief (a) to be misleading in relation to certain important facts, (b) to be non-responsive to the significant issues raised, and (c) to ignore relevant case law bearing significantly on the issues presented. He adheres to his main brief.

Facts

Footnote 3 and on page 5 of Appellee's brief indicates that Chicuelo and Elmer were accompanied by a group of men, some of whom were known addicts, and that Hankins approached Appellant with narcotic vagrancy in mind.

The clear and uncontroverted evidence - that Hankins did not know either Chicuelo or Elmer and that based on the exchange of something, the area, and the group of men following Chicuelo and Elmer, Hankins believed there had been a violation of the Federal narcotics laws (MSTR 32, 33, TTr 68) - belie the Government's contention that Hankins merely approached Chicuelo after the others had conveniently departed the scene to make a narcotics observation.

Applicability of 26 U.S.C. 4704(a)
To Possessor-Addict

The brevity (less than one page) of Appellee's brief on this significant issue and the nature of his statements, indicate that Appellee did not appreciate the thrust of Chicuelo's arguments or deliberately chose not to meet the challenge thereof.

Appellee is correct in stating that the Supreme Court in Robinson v. California, 370 U.S. 660(1960) recognized that criminal penalties could be imposed for possession of narcotics. However, the failure of the Court to require the imposition of such penalties on a possessor-addict attests to the Court's appreciation of the anomalous situation that while a possessor-addict can not be convicted for being an addict he could be convicted for possession of narcotics on the very same evidence.

Appellee would have this Court approve of the Government's circumvention of Robinson of charging possessor-

addicts with the crime of possession, thereby achieving the same result as if the addict had been charged with being an addict prior to Robinson.

Counsel for Chicuelo was unable - after an extensive search of the legislative history on the Harrison Narcotic Act - to find support for the proposition that Congress intended that the Act was to be used to prosecute possessor-addicts. Rather, he has cited authorities in his main brief and analyzed the history of the Act to support his contention that Congress did not intend to prosecute possessor-addicts but possessor-sellers, dealers and the like.

We challenge and invite the Government to meet the questions counsel for Chicuelo has raised concerning Robinson, and to provide evidence on the intent of Congress. Merely to state what Congress' intent was, without citing authority is not sufficient. Indeed, it is the Appellee's duty to enlighten and assist the Court on this vital issue rather than to ignore it.

Illegal Arrest

One of the two pages of Appellee's brief on this point is consumed by a re-statement of facts recited in his counter statement. Appellee completely ignored one of the two cases, Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964), disposition of this issue, and cited in footnote 8 without applying it, the other controlling case

Washington v. United States, ____ U.S. App. D.C. ____ 397
F.2d 705 (1968).

Counsel for Chicuelo submits that Appellee's failure to address his brief to the above-mentioned controlling cases speaks for itself.

Heroin Content

Appellee's brief overlooks the cardinal principle of law that the Government has the burden of proving every element of a crime beyond a reasonable doubt. To state that the Government could not meet the burden of proof (see footnote 16) is to beg the issue.

The mere fact that what was taken from Chicuelo could have been ingested by him in the manner customarily used by addicts is not evidence that the substance was useable as a narcotic so as to have a physiological medical reaction.

The counsel for Chicuelo challenges the Government to show by any process of logical reasoning that by mere showing the "presence" of an ingredient in a compound of ingredients, the "amount" of that ingredient is "obviously established".

CONCLUSION

For the reasons stated in the Appellant's Main Brief and in this Reply Brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas A Addams, hereby certify that a copy
of the foregoing Reply Brief for Appellant was mailed to
Frank Q. Nebeker, Assistant U. S. Attorney for the District
of Columbia, Appellate Section, U. S. Courthouse, Washington,
D. C., this 16th day of December, 1968.

Nicholas A Addams